COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 015366-00**

Guei Fang Zhang	Employee
Midtown Home Health Services, Inc.	Employer
Eastern Casualty Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Costigan)

APPEARANCES
William M. LeDoux, Esq., for the employee
John A. Smillie, Esq., for the insurer

CARROLL, J. In an unusual reversal of roles, the employee is the appellant from a decision awarding her permanent and total incapacity benefits for her January 2000 industrial injury. The employee's issue on appeal is that the judge erred by neglecting to award her benefits at a compensation rate in accordance with the adjustment available under G. L. c. 152, § 51A.[1] We agree that the judge's order should have reflected the rate of compensation available to the employee as of the date the decision was filed. We therefore vacate the judge's order, and award the employee benefits at the minimum compensation rate in effect on the December 29, 2004 filing date.[2]

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[1] General Laws c. 152, § 51A, provides:

> In any claim in which no compensation has been paid prior to the final decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision, rather than the date of the injury.

[2] General Laws c. 152, § 34A, provides:

> While the incapacity for work resulting from the injury is both permanent and total, the insurer shall pay to the injured employee, following payment of compensation provided in sections thirty-four and thirty-five, a weekly compensation equal to two-thirds of his average weekly wage before the injury,

Pertinently, the judge did not award § 34A benefits following the § 10A conference,[3] nor did the insurer voluntarily pay any § 34A benefits at any time prior to the award in the decision. As such, "no compensation [had] been paid prior to the final decision on [this § 34A] claim," see footnote 1, supra, and § 51A therefore applied to the claim. Since § 51A is self-operative, it does not matter that the employee did not raise the issue at the hearing. (Ex. 1.) See Arruda v. George E. Keith Co., 5 Mass. Workers' Comp. Rep. 14, 15 (1991). The employee also correctly points out that § 51A applies to the § 34A *claim*; it does not matter that § 34 benefits had already been paid for the *injury*, as the statute does not use that term. See Mugford v. Fluor Constr., 7 Mass. Workers' Comp. Rep. 190, 191 (1993).

Accordingly, we vacate the judge's award of § 34A benefits at the rate of $149.93 (the minimum compensation rate at the time of the industrial injury in January 2000) and order that the benefits be paid at the minimum compensation rate of $183.76 in effect on the filing date of the decision, December 29, 2004.

We summarily deny § 14(1) penalties.

So ordered.

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Martine Carroll
Administrative Law Judge

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but not more than the maximum weekly compensation rate nor less than the minimum weekly compensation rate.

[3] The employee points out that the judge's narration of the procedural history of the case was incorrect. The matter came to conference as the employee's claim for § 34A benefits, not the insurer's discontinuance complaint, as stated in the decision. (Dec. 837.) The insurer does not dispute the employee's representation of the procedural history.

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William A. McCarthy
Administrative Law Judge

Filed: **September 27, 2005**

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Patricia A. Costigan
Administrative Law Judge